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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Michael Feinberg, et al.,

13 Defendants.
14

No. CR-18-01786-001-TUC-JAS (DTF)

ORDER

15 Jury Issues

16 In light of the continuing COVID-19 pandemic, the District of Arizona instituted
17 special measures and precautions pertaining to jury trials. To allow for proper social
18 distancing, the Jury Room can only accommodate up to 56 jurors, and the largest
19 Courtroom in Tucson (i.e., the Special Proceeding Courtroom) can only accommodate up
20 to 38 jurors. The jury in this case will consist of 14 jurors (i.e., 12 jurors and two
21 alternates). In order to limit the number of jurors physically coming to Court for voir dire,
22 the Court directed the Jury Commissioner to send questionnaires to 250 prospective jurors.
23 As of the date of this Order, 187 jurors responded to the questionnaires. The purpose of
24 the questionnaires was to allow the Court and the parties to determine prior to trial whether
25 we could narrow the list to approximately 56 jurors who have no issues with impartiality
26 and fairness, and otherwise would not be excused by this Court at trial as they could not be
27 impartial, or had a financial, health, or other personal hardship.
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1 The Court has reviewed the entirety of the 187 questionnaires¹, and finds that the
 2 following jurors appear fair and impartial, and are not subject to dismissal from the jury
 3 for financial, health, or other personal hardships (Juror Numbers follow – there are 59): 6,
 4 19, 25, 26, 57, 68, 71, 75, 78, 92, 94, 110, 111, 121, 140, 192, 214, 231, 237, 277, 282,
 5 328, 357, 366, 388, 394, 396, 420, 425, 430, 440, 449, 492, 533, 546, 562, 618, 627, 667,
 6 734, 737, 757, 766, 767, 776, 795, 800, 802, 826, 827, 875, 904, 911, 922, 928, 970, 998,
 7 1009, 1016.

8 The Court will direct the Jury Commissioner to summon 56 jurors (from the list
 9 above) for voir dire unless the parties can offer a valid reason why these jurors should not
 10 be summoned.

11 As to all of the jurors not listed above, a review of the questionnaires reflects that
 12 the Court would excuse them at trial (and the parties would likely stipulate to excusing
 13 them at trial) as they could not be fair and impartial, or are subject to dismissal for financial,
 14 health, or other personal hardships. *See* 28 U.S.C. § 1866(c) (“[A]ny person summoned
 15 for jury service may be . . . excused by the court [due to] . . . undue hardship or extreme
 16 inconvenience . . . [or are] unable to render impartial jury service . . .”).

17 The process at issue is necessary in light of the unprecedented circumstances
 18 surrounding the COVID-19 pandemic; the special measures and precautions at issue are
 19 necessary to mitigate risks to the public, the parties and counsel, and Court employees.
 20 The jurors that are not being called to personally appear for voir dire would otherwise be
 21 excused by this Court in any event at trial (as they would simply orally repeat their written
 22 reasons justifying dismissal during voir dire), and the parties would likely stipulate to their
 23 dismissal based on valid reasons reflected in 28 U.S.C. § 1866(c).

24 The Court will hear from the parties at the pretrial conference as to these jury issues,
 25 but as referenced above, their focus should be on the juror numbers identified by the Court.

26 ¹ The Court notes that subsequent to the questionnaires being returned by the jurors, the
 27 District of Arizona lifted the Court’s mask mandate. As such, the Clerk’s Office contacted
 28 the jurors again to see if they had any concerns regarding the lifting of the mandate; the
 deadline to email any concerns back to the Court was March 21, 2022. The Court has also
 reviewed those emails (which have also been provided to the attorneys – along with the
 original questionnaires) in determining who would be an appropriate juror in this case.

1 Jury Instructions

2 The Court has reviewed all of the jury instructions submitted by the parties. *See*
 3 Doc. 132. As to all of the stipulated jury instructions, they are appropriate for trial, and
 4 they will be used by the Court at trial. There are only two disputed jury instructions, and
 5 there is only one primary dispute as to the two instructions. *See* Doc. 132 at pages 56-61.
 6 Defendants seek to include an “overt act” requirement as to conspiracy to commit wire
 7 fraud; however, as the Government correctly argues, an “overt act” is not required for
 8 conspiracy to commit wire fraud (*see* Doc. 56 at p. 57, line 10-12 and Doc. 56 at p. 58,
 9 lines 2-5. As such, Defendants’ objection is overruled and the two disputed instructions
 10 advanced by the Government will be used at trial. *See* Doc. 132 at pages 56-61.²

11 Verdict Forms

12 The stipulated verdict forms are appropriate and will be used at trial. *See* Doc. 130.
 13 However, the Court notes that at page 4 (lines 5-9) and page 6 (lines 5-9) of Doc. 130 -
 14 there appears to be a typo where a deposit is made from “J.V.G.”; the Indictment (Doc. 5
 15 at page 13, line 6) lists “J.V.” (not “J.V.G.”). As such, the Court will use “J.V.” in the
 16 verdict forms to coincide with the Indictment.

17 Voir Dire

18 The parties’ proposed voir dire (Doc. 131) appears appropriate, but it largely
 19 overlaps with this Court’s standard voir dire and the questionnaire that was sent to the
 20 jurors. As such, the Court will not directly ask the parties’ proposed voir dire (Doc. 130).
 21 Rather, after this Court finishes its standard voir dire, the parties will each be permitted an
 22 additional fifteen minutes to ask questions of the jury if they believe it is still warranted.

23 Motions in Limine

24 Pending before the Court are several motions in limine: Docs. 109, 110, 111, 122,
 25 123, 126, 127.

26 As to the motion at Doc. 122, the Government specifically notes that Defendants do

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 28 ² The disputed instruction appearing at pages 59-61 will be inserted after page 11 of the
 stipulated instructions, and the disputed instruction appearing at pages 56-57 will be
 inserted after page 45 of the stipulated instructions.

1 not oppose the motion; as such, the unopposed motion at Doc. 122 is granted.

2 As to the remaining motions, the only written opposition that was filed as to any
3 motion pertains only to Doc. 109. *See* Opposition at Doc. 116. In Doc. 109, the
4 Government correctly argues that there is an abundance of authority showing that
5 Defendants can not blame the victims at trial for falling for fraudulent representations by
6 Defendants in making their investment decisions; thus, the Government seeks to exclude
7 Defendants from arguing that certain victims (such as experienced investors) were
8 negligent in failing to determine that Defendants' representations were unfounded. *See*
9 *generally United States v. Winkle*, 477 F.3d 407, 418 (6th Cir. 2007) (FDIC report detailing
10 that bank CEO was allowing defendants check kiting scheme to go forward to avoid
11 detection of embezzlement by CEO was properly precluded under Federal Rules of
12 Evidence 401 and 403); *United States v. Thomas*, 377 F.3d 232, 240-41 (2nd Cir. 2004)
13 (“We refuse to accept the notion that “ ‘the legality of a defendant's conduct would depend
14 on his fortuitous choice of a gullible victim’ ”; defense properly prohibited from cross-
15 examining representative of victim lender about lack of caution and diligence in dealing
16 with defendant); *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) (precluding
17 evidence that victim lender was negligent in failing to request additional information that
18 may have revealed fraud); *United States v. Coyle*, 63 F.3d 1239, 1244 (3rd Cir. 1995) (“The
19 negligence of the victim in failing to discover the fraudulent scheme is not a defense to
20 criminal conduct.”); *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991)
21 (excluding evidence of lender's conduct because it “would have improperly shifted the
22 jury's attention away from the knowledge and intent of the [defendant] and focused instead
23 on the beliefs of the victims of the alleged scheme to defraud”); *United States v. Moore*,
24 923 F.2d 910, 917 (1st Cir. 1991) (approving jury instructions stating: “[I]t is not a defense
25 that the bank might have prevented its losses had it better internal controls or procedures.”);
26 *United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980) (rejecting defense based on
27 victim's failure to have taken steps to uncover fraudulent scheme: “The laws protecting
28 against fraud are most needed to protect the careless and the naive from lupine predators,

1 and they are designed for that purpose.”). Defendant argues that the Government opened
 2 the door to victim blaming simply because it referenced Doc. 19 (that contained materials
 3 about risks and uncertainties in investing) during J.V.G.’s deposition; the Court does not
 4 find this argument persuasive, Defendant cites no authority to support such a position, and
 5 the argument is rejected. The Government’s motion at Doc. 109 is granted.

6 As to all of the remaining motions in limine appearing at Docs. 110, 111, 123, 126,
 7 and 127, the Defendants did not file any written responses opposing these motions.³ As
 8 reflected in the Court’s previous Order, the deadline to file any responses to motions in
 9 limine expired on March 18, 2022. *See* 104 (Order at p. 4: “Responses to motions in limine
 10 are due no later than **Friday, March 18, 2022.**”) (emphasis in the original). Untimely
 11 responses would violate this Court’s Orders, and this Court will enforce its own Orders.⁴
 12 Furthermore, the Local Rules provide that the failure to file a timely written response to a
 13 motion may be deemed a consent to the granting of the motion and the Court may dispose
 14 of the motion summarily. *See* LRCrim 12.1 (incorporating LRCiv 7.2); LRCiv 7.2(b)
 15 (parties shall serve and file a memorandum setting forth the points and authorities in
 16 support of their position); 7.2(i) (if counsel does not serve and file the required responsive
 17 memoranda, such non-compliance may be deemed a consent to the granting of the motion

18 ³ Although the Government conferred with Defendants and summarily noted that
 19 Defendants opposed the motions within the Government’s own motions in limine,
 20 Defendants did not actually file any written oppositions to the motions in limine at issue.

21 ⁴ A “district court is given broad discretion in supervising the pretrial phase of litigation,
 22 and its decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed
 23 unless they evidence a clear abuse of discretion . . . In general, the pretrial scheduling order
 24 can only be modified upon a showing of good cause . . . The pretrial schedule may be
 25 modified if it cannot reasonably be met despite the diligence of the party seeking the
 26 extension.” *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.
 27 2002). “[C]arelessness is not compatible with a finding of diligence and offers no reason
 28 for a grant of relief.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir.
 1992). “A scheduling order is not a frivolous piece of paper, idly entered, which can be
 cavalierly disregarded by counsel without peril . . . Disregard of the [scheduling] order
 would undermine the court’s ability to control its docket, disrupt the agreed-upon course of
 the litigation, and reward the indolent and the cavalier.” *Id.* at 610. In light of these
 considerations, “if the party seeking the modification was not diligent, the inquiry should
 end and the motion to modify should not be granted.” *Zivkovic*, 302 F.3d at 1087. Actions
 that violate deadlines set in the Court’s Scheduling Orders are properly deemed untimely,
 and may be denied solely on these grounds. *See, e.g., Johnson*, 975 F.2d at 608-09; *U.S.*
v. Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985),
superseded on other grounds, Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir.
 1996); *Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988).

1 and the Court may summarily grant the motion).

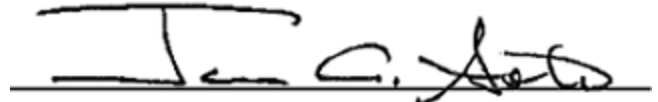
2 In light of the foregoing, the Government's motions in limine appearing at Docs.
3 110, 111, 123, 126, 127 are summarily granted. In the alternative, the Court has reviewed
4 the points and authorities in the Government's motions, agrees with the Government's
5 position, and therefore the motions appearing at Docs. 110, 111, 123, 126, 127 are also
6 granted on the merits.

7 Conclusion

8 Accordingly, IT IS HEREBY ORDERED as follows:

- 9 (1) The Government's motions in limine (Docs. 109, 110, 111, 122, 123, 126, 127)
10 are **granted**.
11 (2) The Court will proceed at trial as discussed in the text of this Order as to juror
12 issues, jury instructions, verdict forms, and voir dire.

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14 Dated this 22nd day of March, 2022.

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19 Honorable James A. Soto
20 United States District Judge
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